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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE FIRST NATIONAL BANK OF PORTLAND, a Corporation,

Appellant

vs.

E. J. DODGE COMPANY, a Corporation,

Appellee

APPELLANT'S BRIEF

Appeal from the District Court of the United States for the District of Oregon

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STATEMENT OF THE CASE.

This is an appeal from the order of the District Court directing the issuance of an injunction *pendente lite.*

The complaint alleges in substance that on or about September 25, 1914, one E. D. Porter, who was

manager, secretary and treasurer, and a member of the board of directors of the plaintiff, claiming to represent and act for plaintiff, entered into an agreement with the defendant, who then owned 200 shares of the capital stock of the plaintiff, for the purchase of said stock for the sum of $41,000, and in payment for said stock, made, executed and delivered to the defendant four promissory notes of the plaintiff corporation, all dated September 25, 1914, bearing interest at five per cent per annum, interest payable semi-anuually, and being negotiable in form and bearing the imprint of the corporate seal of the plaintiff, for the several amounts and payable at the times following:

$10,000 one year after date.
$10,000 two years after date.
$10,000 three years after date.
$11,000 four years after date.

That said shares of stock so purchased by plaintiff was left with defendant as collateral security for the indebtedness aforesaid.

That since the making of said contract, the said E. D. Porter, acting for the plaintiff, paid to the defendant on account of the $10,000 note maturing September 25, 1915, the sum of $5,000, leaving $5,000 still unpaid thereon, and also paid the interest as the same became due on all the notes, interest being paid upon the whole of said indebtedness to October 16, 1915. The bill of complaint further alleges that the said E. D. Porter had no right or authority from plaintiff to execute said agreement or to purchase

said stock, to execute the notes described, or to make any payments on account thereof; that the board of directors had no knowledge of such action, and no record was made on the company's books thereof, knowledge of said transaction being first acquired by the directors on or about October 26, 1915, when they disapproved and disaffirmed the transaction. It is also alleged in the bill of complaint that the agreement to purchase its own stock by plaintiff from defendant is illegal and void and in violation of the provisions of Section 309 of the Civil Code of California, prohibiting directors of corporations from reducing the capital stock, as construed by the Supreme Court in the case of *Schutte v. Boulevard Garden Co.*, 164 Cal. 464.

The bill then prays for a preliminary injunction restraining the defendant from negotiating, transferring or disposing of the promissory notes pending this suit, and from instituting or prosecuting any action upon said notes, etc.

Upon the return day of the order to show cause why a preliminary injunction should not issue, the defendant appeared and filed the affidavit of its vice-president and cashier controverting the material allegations of the complaint, admitting that on or about September 25, 1915, plaintiff, acting by the said E. D. Porter, and defendant entered into and executed the agreement for the sale by defendant to plaintiff of 200 shares of stock as alleged in paragraph V of the complaint, alleging that said E. D. Porter had full authority to act for plaintiff, and

that the directors and stockholders had full knowledge of the transaction and that at a meeting of the board of directors of plaintiff corporation held September 25, 1914, action was taken authorizing the purchase of the stock and execution of the notes in question. (P. 21, Trans. of Record.)

It was further shown by defendant upon the hearing of the application for a preliminary injunction, that the sale of said stock to plaintiff was made in good faith, and for full value; that plaintiff acted with full knowledge of all the circumstances surrounding the transaction and it deemed acquisition of said stock advantageous to it. It was also shown that defendant acquired title to said stock from the prior owner thereof in pursuance of an agreement with plaintiff that it should do so and to thus enable defendant to sell said stock to the defendant. (Affidavit E. A. Wyld, p. 19, Trans. of Record.)

The bill of complaint charges the defendant with no fraud or misrepresentation, and so far as the transaction is disclosed by the complaint, the defendant acted with the utmost good faith. It is, however, alleged that E. D. Porter, the manager, secretary, treasurer and director of the plaintiff, had no authority to purchase the stock or execute the notes, but this allegation is distinctly disproved by the action of the board of directors, as evidenced by the resolution adopted. (P. 21, Trans. of Record.)

The question arising upon this appeal and for this Court to determine is, was the District Court warranted upon the showing made in granting the injunction *pendente lite?*

POINTS AND AUTHORITIES.

An injunction, being the "strong arm of equity," should never be granted except in a clear case of irreparable injury, and with a full conviction on the part of the Court of its urgent necessity. To justify the Court in granting the relief, it must be reasonably sataisfied that there is an actual intention on the part of the defendant to do the act which it is sought to enjoin, or that there is probable ground for believing that, unless the relief is granted, the act will be done.

High on Injunctions, Sec. 22.

It is always a sufficient objection to the granting of an injunction that the party aggrieved has a full and adequate remedy at law, and it is a well established rule that courts of equity will not lend their aid for the protection of rights or the prevention of wrongs where the ordinary legal tribunals are capable of affording sufficient redress. And where it does not appear that the remedy at law is inadequate, or that the party aggrieved is entitled to more speedy relief than can be obtained by the ordinary process of courts of law, an injunction will be refused.

High on Injunctions, Secs. 28, 89.

The object and purpose of a preliminary injunction is to preserve the existing state of

things until the rights of the parties can be fairly and fully investigated and determined upon strictly legal proofs, and according to the course and principles of courts of equity. The prerequisites to the allowance and issuance of such injunction are that the party applying for the same must generally present a clear title, or one free from reasonable doubt, and set forth acts done or threatened by the defendant, which will seriously or irreparably injure his rights under such title, unless restrained. The legal discretion of the judge or court in acting upon applications for provisional injunctions is largely controlled by the consideration that the injury to the moving party, arising from a refusal of the writ, is certain and great, while the damage to the party complained of, by the issuance of the injunction, is slight or inconsiderable.

Blount v. Societe, etc., 53 Fed. 101.

It is the practice of the federal courts to refuse an injunction *pendente lite* unless the case shows beyond reasonable question the necessity for such intervention.

Paul Steam System Co. v. Paul, 129 Fed. 757.
Harriman v. Northern Securities Co., 197 U. S. 244.

Equity will refuse its aid to a complainant who has himself been guilty of the same inequitable conduct with which he charges respondent.

Thompson Co. v. American Law Book Co., 122 Fed. 922.

A party seeking the aid of a court of equity must come with clean hands, and when he asks relief against injustice arising from the bad faith of his adversary, he must not be obnoxious to the same imputation. No man is entitled to the aid of a court of equity, when that aid becomes necessary by his own fault.

Dilly v. Bernard, 8 Gill & J. 170.
Ward v. Hartlet, 178 Mo. 135 (77 S. W. 302).
Sioux City v. Chicago, etc., 129 Iowa, 694 (106 N. W. 183).

The illegality of the contract being disclosed as the groundwork of plaintiff's claim, the court will not relieve from the effect of his own agreement.

Clark on Contracts, 493-4.
Pomeroy's Equity, Secs. 402, 939.

No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation. This principle is equitable, because it forbids the untruthful or culpably negligent deceiver from profiting by his own wrong, at the ex-

pense of the innocent purchaser or contractor who believed him. It is salutary, because it represses falsehood and fraud.

Illinois Trust & Savings Bank v. City of Arkansas City, 76 Fed. 293, and cases cited.

A corporation is estopped to question the validity of its void guaranty, because it permitted the circulation of the bonds that carried it. A corporation, quite as much as an individual, is held to a careful adherence to the truth in all their dealings with mankind, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced.

Zabriskie v. Railroad Co., 23 How. 381, 400, 401.

Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which oth-

ers have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly regards it.

Casey v. Galli, 94 U. S. 673-680. See cases there cited.

National Bank, etc. v. Stewart, 107 U. S. 676.

ARGUMENT.

The relief sought by plaintiff in its complaint is based upon two grounds:

1. That Porter, who the bill alleges was manager, secretary, treasurer and a director of the plaintiff, had no authority to make the agreement for the purchase of the stock and no authority to execute the notes in the name and on behalf of the corporation.

2. That the plaintiff was prohibited by the laws of California from purchasing its own stock.

This appeal does not necessarily involve the merits of the controversy, yet if it can be shown that there is no equity in the bill and that plaintiff is entitled to no relief, the error of the District Court in awarding a preliminary injunction, will be the more apparent.

> "The issue of an interlocutory injunction is never a matter of right, but rests in the sound discretion of the court. In order to obtain one, the plaintiff must show either that there is no doubt of the wrongful nature of the act sought to be enjoined, * * * or that the injury which will result to him from the refusal of the injunction will be very great and that to the defendant from the issue thereof very slight, otherwise an interlocutory injunction will be denied him. * *"

Sec. 294 Foster's Federal Practice.

Sec. 73, Eq. Rules U. S. S. C.

Then, again, "it is an indispensable condition * * that the moving party has not been guilty of a substantial violation of it himself." (167 Fed. 57.)

The plaintiff has sought the intervention of a court of equity, and to entitle it to relief, it must come into court with clean hands. Has it done so? The plaintiff invested E. D. Porter with the apparent authority to transact the business and exercise all the functions pertaining to the offices held by him, and which would ordinarily embrace making the contract in question. If, relying upon such authority, the defendant contracted with E. D. Porter, acting for plaintiff, does it now lie in the power of the corporation to discredit its officer and repudiate the contract made by him on its behalf? The trend of the American and English authorities is to the effect that the corporation would be estopped to impeach the transaction. If the contract be *ultra vires,* a creditor of the corporation whose rights may be injuriously affected, or possibly, a non-assenting stockholder, might seek the relief here applied for, but not the corporation at whose instance the alleged *ultra vires* contract was made. Neither a creditor nor stockholder is complaining, but the corporation making the contract seeks to relieve itself therefrom. This it may not do, for having seen fit to invest its manager, secretary, treasurer and director with the apparent authority to represent and act for it, and to transact the business usually transacted by such officers, it will not be heard thereafter to say to one who, acting in good faith, relying upon such authority,

that such officer acted without authority or exceeded his authority in the transaction in question.

Then, again, when a contract between corporations, or between a corporation and an individual, has been executed by one of the parties and not the other, the delinquent party cannot set up *ultra vires* as a defense. This contract, at least that portion thereof which required the defendant to purchase from the former owner thereof the stock in question so that it might sell the same to the plaintiff, has been completed. It is only when a contract remains wholly executory that the defense of *ultra vires* is available. (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Bradley v. Ballard,* 55 Ill. 413; *Thompson v. Lambert,* 44 Iowa, 239.)

Without intending except in a very general way, to discuss the merits of the controversy involved in this suit arising out of the question whether the purchase of the stock by plaintiff is in violation of Sec. 309, Civil Code of California, we beg to call the Court's attention to the fact that such agreement is not intrinsically immoral or evil. No fraud or deception upon any one was designed by the parties thereto. If such contract was in violation of law, it is so only because the law deems it inexpedient for corporations to acquire by purchase its own stock with corporate funds. But beyond all that, we submit that the facts disclosed by the record upon this appeal show that the contract in question is not condemned by Section 309 of the Civil Code of Califor-

nia, nor is it affected by the decision of the Supreme Court (164 Cal. 464).

It will also be observed from a careful reading of the various cases in which courts have held that corporations are without power to purchase their own stock, that in practically all these cases, the controversy arose over the complaint of creditors or stockholders contending that the purchase of the stock would result in depleting the assets of the corporation and bring about financial embarrassment or ruin. In the California case relied upon by plaintiff as the basis of its complaint in this suit, the Court uses this language:

> "All that has been said is subject to the qualification that the rights of creditors are not to be affected by any arrangement between the purchaser of the stock and the corporation. Undoubtedly a creditor of the corporation would be entitled to hold the conditional purchaser as a stockholder and to insist that the amount of his subscription be made applicable to the satisfaction of the corporate debts. In most of the cases cited by appellant, the courts were dealing with states of fact in which the rights of creditors were involved. But no such question arises here; the complaint alleging that the assets of the corporation are greatly in excess of its indebtedness."

Within the principle announced in the case just cited the sale of the stock made by defendant to plaintiff in pursuance of the previous request made by plaintiff to defendant to acquire the same, is not improper or illegal, but will be sustained.

We also submit that if the contract of purchase and sale complained of by plaintiff is illegal and void, as claimed, the defendant would have a perfect defense in an action at law upon any of the notes that might be sued upon, and therefore plaintiff has no right to resort to equity. Further objection to the relief sought by plaintiff is found in the fact that both corporations, the E. J. Dodge Company and the First National Bank of Portland are solvent, going concerns, and neither the rights of creditors or stockholders can be injuriously affected by the agreement in question, and the defendant is amply able to respond to any just demand that the plaintiff may be able to establish against defendant. For this reason, if there were no other, a preliminary injunction ought not to have been granted, as its denial involved no risk of irreparable injury to plaintiff. (109 Fed. 278.)

In conclusion, we will refer the Court to the language used by Kirkpatrick, J., in *Payne v. U. S. Playing Card Company,* 90 Fed. 544:

> "Not only is the right of the complainant to hold the defendant herein to a performance of the contract not clearly shown, but serious objections are raised as to the validity of the contract itseif,—whether it is not void for failure of consideration, or as being contrary to public policy, and whether, if valid, it has not by its terms expired. These are questions that ought not to be decided upon *ex parte* affidavits, nor until the parties have had opportunity to present to the court the fullest proof respecting the

same. The defendant corporation is represented to be of the largest financial responsibility, and it is questionable whether an action at law would not afford the complainant all the relief to which he may be entitled. To grant an injunction at this time would be to determine in advance, in favor of the complainant, all the disputed questions in the case, without giving the defendant an opportunity to be heard. The interference of the court by way of injunction does not seem necessary to preserve any right which the complainant may have."

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,
Solicitors for Defendant.